MOTION FILED
AUG 2 1985

No. 84-1601

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

vs.

MARGARET W. LAVOIE and
ROGER J. LAVOIE, SR.,
Appellees.

ON APPEAL
FROM THE SUPREME COURT OF ALABAMA

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE, AND BRIEF OF AMICI CURIAE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLANT

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August 2, 1985

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California hereby respectfully move for leave to file the attached brief amici curiae in this case. The consent of the attorney for the appellant has been obtained and is being

filed with the Court. The consent of the attorney for the appellees was requested but refused.

The two proposed amici together represent approximately 2,800 attorneys throughout California who regularly represent the interests of defendants in tort litigation, frequently having been retained by the defendant's insurer. The two organizations, and their members' clients, are vitally interested in the question whether a state may constitutionally impose a penalty, essentially unrelated to the substantiality of the issues, based upon the exercise by a judgment debtor of its statutory right of appeal.

In the present case the constitutionality of Alabama's automatic penalty for losing an appeal was raised in the Alabama Supreme Court and in appellant's jurisdictional statement in this Court. Appellant, however, challenges the statute solely on Equal Protection grounds. This Court should be aware of, and may wish to consider, an equally significant constitutional problem: the seriously chilling effect of the statute on the exercise of a judgment debtor's First Amendment right to petition for redress of grievances by filing and prosecuting an appeal. If this First Amendment argument is accepted, it will be dispositive of the issue of the validity of the statute.

Respectfully submitted,

ARTHUR E. SCHWIMMER
Attorney for Association of
Southern California Defense
Counsel and Association of
Defense Counsel of Northern
California

August 2, 1985

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BRIEF OF AMICI CURIAE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLANT

INTEREST OF AMICI CURIAE

The Association of Southern California Defense Counsel and Association of Defense Counsel of Northern California together represent approximately 2,800 attorneys throughout California who regularly represent the interests of defendants in tort litigation, frequently having been retained by the defendant's insurer. The two organizations, and their members' clients, are vitally interested in the question

whether a state may constitutionally impose a penalty, essentially unrelated to the substantiality of the issues, based upon the exercise by a judgment debtor of its statutory right of appeal.

SUMMARY OF ARGUMENT

One of the fundamental rights protected by the First Amendment is that of access to the courts. Alabama grants litigants the right to appeal from adverse judgments, but automatically imposes a 10 percent penalty against persons who appeal from an adverse *money* judgment and lose, regardless of the substantiality of the issues presented. That penalty has a seriously chilling effect on legitimate appeals by judgment debtors and, by reducing the number of appeals brought by a major class of litigants, defeats the institutional purposes of the appellate courts. Accordingly, the statute violates the First Amendment.

ARGUMENT

SECTION 12-22-72 OF THE CODE OF ALABAMA HAS A CHILLING EFFECT ON LEGITIMATE APPEALS AND THEREBY VIOLATES THE RIGHT OF ACCESS TO THE COURTS INHERENT IN THE FIRST AMENDMENT RIGHT TO PETITION FOR REDRESS OF GRIEVANCES.

The Supreme Court of Alabama has affirmed a judgment of $3,501,650 against appellant Aetna Insurance Co. ("Aetna"). App. A, pp. 1a, 40a. Pursuant to section 12-22-

72, Code of Alabama (1975)[1], "10 percent damages", or $350,165, will automatically be added to this judgment, solely because Aetna lost its appeal. Appellees suggest the purpose of the Alabama legislature in enacting this statute was to discourage frivolous or dilatory appeals, and to provide additional damages to successful plaintiffs for delay in obtaining satisfaction of their judgments. Motion To Dismiss, pp. 18, 19. But the statute requires no individualized determination of the frivolity of the particular appeal for which the penalty is imposed; deterrence against frivolous and dilatory appeals is specifically provided by Rule 38, Alabama Rules of Appellate Procedure (appellate court may award damages for such appeals); and Alabama's provision for 12% interest on an unsatisfied judgment pending appeal (Section 8-8-10, Code of Alabama (1975); Rule 37, Alabama Rules of Appellate Procedure) already compensates for plaintiffs' delay in collection. The penalty of section 12-22-72 is thus imposed simply for losing, nothing more.[2]

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[1] "When a judgment . . . is entered . . . for money . . . and the same has been stayed on appeal by execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against any or all of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court . . . ."

[2] The notion that Aetna should have raised the question of the validity of the statute in its initial briefs to the Alabama Supreme Court ignores reality. No appellant's counsel would desire to send such a signal of expected defeat on the merits. Further, in view of the Alabama Supreme Court's frequent consideration of issues pertaining to section 12-22-72 on proceedings after decision on the merits (see Jurisdictional Statement, pp. 11-12; Reply Memorandum, pp. 3-4), this Court should not hold that Aetna's presentation of the constitutional issue was untimely.

Quite apart from the violation of equal protection inherent in the statute, Alabama's penalty on unsuccessful appeals by judgment debtors runs afoul of the First Amendment's guarantee of the right to petition the government for a redress of grievances. This Court has stressed that the right of access to the courts is one aspect of the right of petition, and this is true even where the suit is between private parties. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 76 L.Ed.2d 277, 288 (employer's state court suit against employees); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (private antitrust suit); see *Sure-Tan, Inc. v. NLRB*, __U.S__, 81 L.Ed.2d 732, 746.

As recognized in *Bill Johnson's Restaurants, Inc. v. NLRB, supra*, 76 L.Ed.2d at 290, "The right to litigate is an important one . . . ." Accordingly, a state, like the NLRB in that case, "must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary." *Id.* at 291. While a party may be penalized if its position is "plainly foreclosed as a matter of law or is otherwise frivolous," the First Amendment protection must be afforded if there is "any realistic chance" that the parties' "legal theory might be adopted." *Ibid.* Cf. *Lindsey v. Normet*, 405 U.S. 56, 77-79 (automatic doubling of bond on appeal in certain cases, even where appeal is not frivolous, violates equal protection). That Aetna's appeal in the present case unquestionably was *not* frivolous is underscored by the Alabama Supreme Court's 5-4 decision.

Any statute which even indirectly inhibits the exercise of the right to petition is invalid. As held in *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 222:

> "The First Amendment would, however, be a hollow promise if it left government free to

> destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. [Citations.]"

Thus, having afforded litigants the right of appeal,[3] Alabama cannot properly inhibit the exercise of that right by appellants who raise nonfrivolous issues, even if the means it chooses also deters some frivolous appeals.[4]

Section 12-22-72 violates these principles. The statute necessarily has a seriously chilling effect on the prosecution of appeals by those against whom money judgments have been entered. A party against whom a substantial money judgment is entered must consider that, however potentially meritorious the issues it wishes to present to an appellate court, if it fails to persuade a majority of the justices it will be penalized severely for its efforts. Indeed, where (as in the present case) the excessiveness of the damage award is one of the issues to be raised on appeal, the prospect of paying an additional ten percent of the judgment (in addition to interest and costs) if one loses the appeal will effectively deter a substantial number of judgment debtors with

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[3] An appeal is a classic example of a petition for redress of grievances against the government, namely the judiciary, since the appellant must argue that it did not receive a fair and proper trial in the lower court, the governmental entity which entered judgment against it.

[4] As indicated above, frivolous appeals can be penalized under Rule 38, Alabama Rules of Appellate Procedure.

legitimate grievances from pursuing their appellate remedies; the greater the harm done by the trial court or jury, the greater is the monetary risk in pursuing the appeal.

From an institutional perspective, public policy considerations militate against upholding a statute which so profoundly inhibits access to the appellate courts for judgment debtors, a major class of litigants. In our system of government, the appellate courts provide a major forum for the exchange of views on matters of public importance and exercise a powerful voice in shaping the law. They are unquestionably a vitally important forum for the resolution of issues of public policy.

> "Appellate courts serve two quite different functions: First, appellate courts review the trial record for error in the particular case. We can call this the review for correctness. Second, appellate courts use the cases before them as vehicles for stating and applying constitutional principles, for authoritatively interpreting statutes, for formulating and expressing policy on legal issues of system-wide concern, for developing the common law, and for supervising each level of the system below them. We can call the second set of tasks the institutional functions—the business of Government." (Hufstedler, *New Blocks For Old Pyramids: Reshaping The Judicial System*, 44 S.Cal.L.Rev. 901, 906-907 (1971).)

Of particular significance to this case is the appellate courts' responsibility for shaping common law principles in the field of tort law, although all areas of the law necessarily are affected. Unlike the executive and legislative branches, the appellate courts cannot initiate action but must wait for litigants to request appellate review. To the

extent the Alabama statute inhibits the exercise of the right of appeal by judgment debtors, the cases and issues brought to the appellate courts will be only those presented by plaintiffs. The appellate courts cannot perform their important institutional function without a steady flow of appeals initiated by all sides. They should hear from defendants as regularly as they do from plaintiffs. Only through such free access to the appellate courts can our system of jurisprudence remain effective.

CONCLUSION

If a nonfrivolous appeal can be subjected to an automatic penalty simply because it was not successful, the rights of potential appellants will be seriously chilled.

The "10 percent damages" provision of section 12-22-72 of the Code of Alabama should be declared unconstitutional, and the judgment, if not otherwise reversed on Aetna's appeal, should be entered accordingly.

Respectfully submitted,

ARTHUR E. SCHWIMMER
Attorney for Amici Curiae
Association of Southern
California Defense Counsel
and Association of Defense
Counsel of Northern California

August 2, 1985

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, August 2, 1985, I served the within MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF in re: "Aetna Life Insurance Co. vs. Margaret W. Lavoie and Roger J. Lavoie, Sr." in the United States Supreme Court, October Term, 1984, No. 84-1601;

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

THEODORE B. OLSON; JOHN J. SWENSON; LARRY L. SIMMS; GIBSON, DUNN & CRUTCHER; 1050 Connecticut Ave., N.W., Washington, D.C. 20036;

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JOSEPH M. BROWN, JR.: CUNNINGHAM, BOUNDS, YANCE, CROWDER & BROWN; 1601 Dauphin St., Mobile, Alabama 36660;

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on August 2, 1985
at Los Angeles, California.

Kathleen Kaltenbach